

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

MAR 2 1994

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 94-150
Regulations Governing Attribution)	
of Broadcast and Cable/MDS Interests)	
)	
Review of the Commission's)	MM Docket No. 92-51
Regulations and Policies)	
Affecting Investment)	
in the Broadcast Industry)	
)	
Reexamination of the Commission's)	MM Docket No. 87-154
Cross-Interest Policy)	

To: The Commission

REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom")¹ respectfully submits these reply comments in response to the *Further Notice of Proposed Rule Making* ("*Further Notice*") in the above-captioned proceedings. The focus of these reply comments is the Commission's proposed "equity-or-debt-plus" attribution rule.

¹ Viacom is the indirect licensee of 11 television stations, ten of which are UHF stations and 9 of which are UPN affiliates. The Viacom stations reach approximately 19% of the nation's homes (10% by measure of the "UHF discount"). Viacom is also the 50%-owner of UPN, a nascent television network co-owned by a subsidiary of Chris-Craft Industries, Inc. Viacom, through its Paramount Pictures subsidiary and through its majority ownership of Spelling Entertainment Group, also produces network programs and produces and distributes syndicated television programs and engages in the distribution of off-network television product.

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I. The Proposed "Equity-or-Debt-Plus" Approach: The Commission's Proposal

In the *Further Notice*, the Commission proposed an "equity-or-debt-plus" rule, which, if adopted, would attribute otherwise nonattributable debt or equity interests in a licensee where: (1) the interest holder is either a "program supplier" to the licensee or is a same-market broadcaster or other same-market media outlet subject to the broadcast cross-ownership rules; and (2) the equity and/or debt held, either separately or aggregated, equals or exceeds 33% of a licensee's total capitalization. This rule, the Commission proposed, would be added to, but would not supplant, the Commission's current attribution rules.

II. The Equity/Debt Approach: Comments Filed By Viacom

In comments filed on February 7, 1997 in response to the *Further Notice*, Viacom supported the Commission's proposed "equity-or-debt-plus" rule, but urged adoption of a stringent version of that proposed rule. Specifically, Viacom advocated, and continues to advocate, an "equity-or-debt-plus" approach that triggers attribution at the 10% --not the 33%-- investment level in those instances where an investor is not *contractually precluded* from influencing either (i) a station's program selections, (ii) its hiring of the personnel who make such selections, or (iii) a station's budget. Where participation in such matters is contractually precluded, noted Viacom in its comments, the investment level should be capped at a higher level, for example, at 33%, as suggested by the Commission. Thus, this stricter form of the "equity-or-debt-plus" proposal would confer cognizable status upon an equity or debt holder depending upon the ability --whether contractually or otherwise bestowed-- of the investor or creditor to participate in the programming and related operational functions of a licensed facility.

The strict 10% equity-or-debt limitation Viacom advocates would *per se* apply to any media entity investing in another media entity in the same market and to any broadcast television "network" investing in a television station that is affiliated with the broadcast network.² Viacom urges that a broadcast "network" be defined to include ABC, CBS, NBC, and FOX, as well as the nascent broadcast networks, such as UPN (which is 50%-owned by Viacom), WB, the home shopping broadcast networks, such as HSN and ValueVision, and the foreign-language broadcast networks, Univision and Telemundo.³ Program producers and syndicators would not be considered "networks." Consequently, a broadcast network providing 10% or more of the capitalization of a television broadcast station affiliating with that network would trigger the attribution rules and render the network a cognizable party.

III. The Equity/Debt Approach: The Comments Filed By Others and Viacom's Reply.

Of those parties filing comments in this proceeding, some in addition to Viacom unequivocally support the equity-or-debt-plus approach proposed by the Commission. *See, e.g.,* Knight-Ridder, Inc., Media Access Project, the Network-Affiliated Stations Alliance. One commenter urges its adoption only in connection with a relaxation of the duopoly rule. *See* Sinclair Broadcast Group, Inc. And another argues against any change in the attribution rules, but views the equity-or-debt-plus proposal, if adopted, as a preferred substitute to the Commission's current cross-interest policy. *See* Comments of

² Viacom reiterates the LMA-related proposal it set forth in its comments to the pending local ownership rule making proceeding. *See Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 and 87-8, FCC 96-438 (released November 7, 1996). That proposal advocates application of the equity-or-debt-plus rule to same-market LMA brokers, with an exemption from the duopoly rule where the station brokered is affiliated with a broadcast network other than ABC, CBS, NBC or Fox. *See* Comments of Viacom at 9-10.

³ In its comments, Viacom provided a specific, bright-line definition of "network" with the intention of encompassing at least each of the broadcast networks that exist today, as well as the broadcast networks which may emerge in the future. That definition was predicated upon the patterns of programming and the coverage of existing broadcast networks, as publicly acknowledged by each of those entities. *See* Comments of Viacom at 10.

CBS Inc. Several parties oppose the equity/debt proposal outright, *see, e.g.*, Comments of ABC, Inc., BET Holdings Inc., Fox Broadcasting Company, HSN, Inc., Pappas Stations Partnership, and Tele-Communications, Inc.

Those parties opposing the Commission's proposal to attribute financial investments by broadcast networks, many of whom are either broadcast networks themselves or investors in broadcast networks, argue against adoption of the rule on five grounds. Those arguments are:

- (1) The proposed equity-or-debt-plus rule is unnecessary.
- (2) The proposed equity-or-debt rule is over-inclusive.
- (3) The proposed equity-or-debt rule is under-inclusive.
- (4) The proposed equity-or-debt rule will create regulatory uncertainty.
- (5) The proposed equity-or-debt rule will deny local television outlets of needed capital, will threaten minority broadcast entrepreneurs, and will inhibit the ability of new broadcast networks to emerge.

Viacom contests each of these arguments in order.

A. The Equity-or-Debt-Plus Rule Is Necessary And Will Provide Certainty.

One commenter contends that the proposed rule is unnecessary, because "[t]here is little or no record evidence of any need for making debt and nonvoting equity interests attributable." *See*, Comments of Tele-Communications, Inc. ("TCI") at 2. Yet, the Commission itself in the *Further Notice*, at ¶18, cited a litany of cases in which it had found that the current attribution rules provided little or no guidance for identifying interests that convey the realistic potential to affect the programming decisions of licensees, the objective underlying the rules.

In one "recent transaction," stated the *Further Notice*, the Commission was required to determine the attributable status of a broadcast television network which had "complex and substantial financial interests" in the assignee of a television station. The "collective interests and relationships" in the case, including an affiliation agreement with the network-investor, led the Commission to conclude that the case did not "squarely fall within any of the cases . . . in which the Commission has previously found multiple relationships between a network and its affiliate nonattributable." *Id.* (quoting *BBC License Subsidiary L.P. (WLUK-TV)*, 10 FCC Rcd 7926 (1995)). "Other recent cases," added the *Further Notice*, citing at least five other cases, "have raised similar concerns. . . ." In view of the ample evidence on the record, therefore, Viacom asserts that a new set of guidelines is warranted, including the equity-or-debt-plus rule, which would provide a bright-line test for determining cognizable status.

Further, the Telecommunications Act of 1996, which capped broadcast television station ownership nationwide to a 35-percent audience reach, evidences Congress' intent to limit the amount of television outlets attributed to any one party. In view of this Congressional intent, therefore, realistic attribution rules must be adopted.

Moreover, as noted in Viacom's comments, the equity-or-debt-plus rule is necessary to insure that all players in the broadcast arena are playing by the same rules. Until now, some parties have gained advantages over others because of the uncertainty of the attribution rules. *See* Comments of Viacom at 4-7.

B. The Equity-or-Debt-Plus Rule Is *Neither Over-Inclusive Nor Under-Inclusive*.

Three commenters opposing the proposed equity-or-debt-plus rule contend that the rule is either under-inclusive or over-inclusive. One commenter, for example, maintains that the proposed equity-or-debt-plus rule is under-inclusive, because it only targets program suppliers and does not encompass all of a licensee's "important economic relationships" that are accompanied by "a significant amount of actual or potential influence." *See* Comments of Fox Broadcasting Company at 4. At the same time, two commenters argue that such a rule is *over-inclusive* because it is not "tailored to ensure that [only] aggregated, non-attributed controlling interests are attributed," *see* Comments of TCI at 13-14 (emphasis added), and because it would "impute attribution to parties on the basis of relationships with licenses that are not relevant to control." *See* Comments of ABC at 4.

Viacom, however, believes that the equity-or-debt-plus approach -- which demarcates as attributable those affiliation/financial interests held by broadcast networks in a television licensee -- is appropriately suited for identifying cognizable interests, particularly in light of the declared objective of the Commission in fashioning its attribution rules. That objective is to

identify those interests in or relationships to licensees that confer on their holders a degree of influence or control such that the holders have a realistic potential to affect the *programming decisions* of licensees or other core operating functions.

Further Notice at ¶1. (Emphasis added.) Indeed, Viacom's model, which would compel application of the equity-or-debt-plus rule to all investments in a broadcast television licensee of 10% or more that are not accompanied by contractual prohibitions on participation in programming-related activities of that licensee, would best comport with that objective.

Specifically, Fox asserts that the rule is under-inclusive, because the degree of potential influence that results from equity investments and loans by program suppliers is no greater than that which results from "other kinds of business relationships," including pure broadcast network affiliation agreements, syndication contracts, consulting or management agreements, and loan agreements with restrictive covenants. Comments of Fox at 4-5. ABC, too, contends that there is no basis for finding that a broadcast network affiliation agreement "affords the network or supplier any 'control' of the kind that justifies attribution." Comments of ABC at 6. According to Fox, national sales representatives, for example, "exert significant influence" over station sales and programming practices and "typically advise" their station clients about what syndicated programs to buy. Comments of Fox at 4. Further, notes Fox, banks and other lenders, which provide loans only upon securing affirmative and negative covenants, limit a licensee's discretion over a variety of operational issues. *Id.* at 5.

To the extent "advisors" and lenders to a licensee are also the "program supplier"/network with which a licensee has entered into an affiliation agreement and received financing, Viacom agrees with Fox's conclusion. However, contrary to the arguments of Fox and ABC, Viacom asserts that it is precisely this network connection and the accompanying financing that conveys the power to wield the "realistic potential" to affect programming decisions.

That the broadcast television network-broadcast television licensee relationship is unique among all licensee relationships --including that between the licensee and the syndicator and the institutional lender-- has been recognized by the Commission on more than one occasion. In *Twentieth Holdings Corporation*, 4 FCC Rcd 4052, 4054 (1989), the Commission stated that "the relationship between an affiliate and a network is substantial and ongoing" and that "a network affiliation goes to the essence of a station's operations." And in *Roy M. Speer*, FCC 96-258 at ¶99 (released June 14, 1996), the Commission acknowledged that an "outside" lender, that is, one with no programming or other ties to a television licensee, "legitimately has concerns" about the programming affiliation agreements of the station operated by the borrower-licensee, but that those concerns are "prompted by an interest in insuring the continued influx of revenues generated by such affiliation, not by the commercial success of a given television network or other programmer." In sum, the broadcast network-broadcast television station relationship is unique because the broadcast network is the lifeblood of the station. Accordingly, Viacom believes that the Commission's equity-or-debt-plus proposal, which would deem cognizable a broadcast television network affiliating with and financing a broadcast station, is the correct guideline to adopt in order to identify those interests with the "realistic potential" of affecting programming decisions.

ABC and TCI specifically assail as over-inclusive the application of the equity/debt rule to same-market broadcasters which invest in another station in the market. ABC contends that any "likelihood of control" by a same-market broadcaster is tied to the debt or equity interest, which should be examined on its own merits, apart from the status of the source of those funds.

Viacom submits that a same-market media entity investing in a broadcast television station is distinguishable from a broadcast network investing in an affiliated station. Nevertheless, Viacom believes that the attribution rules must encompass the same-market investment situation because there is significant potential to influence the core operations of each media entity so as to adversely affect diversity and competition in the local market. In the case of one party holding attributable interests in more than one television station in the same market, or DMA, that party would enjoy a degree of horizontal integration that could diminish the number of voices to the viewing public and could impair robust competition. And, in the case of one party holding attributable interests in a broadcast television station and a cable system in the same area, similar concerns are raised, especially in light of broadcast television carriage issues.

C. The Proposed Equity-or-Debt-Plus Rule Establishes a Bright-Line Test.

TCI contends that the equity-or-debt-plus rule will increase regulatory uncertainty, because "either debt or equity interests may independently result in attribution under the rule, which will require that the Commission appropriately classify each interest." Comments of TCI at 17. Viacom submits that the Commission may, in some cases, be the arbiter of classifying financial interests, but the responsibility of reporting the type and amount of equity, debt, and total capitalization of a particular media entity is that of the licensee. Thus, in a transfer or assignment application, the parties to the application would be obligated to report the level of financial interest they hold in the proposed transferee or assignee. And similar reporting requirements would be imposed on those parties in submitting Form 323 Ownership Reports. Absent any substantial restructuring of an entity's capitalization, the reporting requirement would be periodic, and not subject to the daily fluctuations of the markets.

TCI also argues that the total capitalization standard would impact business decisions relating to when and how to pay down or acquire new debt. Yet, Viacom contends that this concern exists under the current attribution rules and the foreign ownership statutes. Not only must a corporate licensee periodically monitor its number of issued and outstanding stock and the holders of such stock for purposes of calculating voting percentages (for broadcast and cable attribution rules, *see* Sections 73.3555 and 76.501) and equity percentages (for MMDS, or wireless cable, rules, *see* Section 21.912), under Commission attribution rules, but it must periodically survey the citizenship of stockholders and the source of credit for purposes of complying with Section 310(b) of the Communications Act or for responding to the Commission's inquiries on broadcast transfer and assignment applications.⁴ Accordingly, the equity/debt rule, as proposed by Viacom would impose no new burdens on the licensee and would no more impact business decisions than they are already impacted under existing rules. In fact, under the equity/debt rule, equity, debt and total capitalization would need to be computed by licensees only where they are financed by a broadcast network with which they are affiliated or by a media entity located in the same market. The rule's application will, therefore, be limited in application.

Additionally, we agree with the suggestion propounded by CBS Inc., *see* Comments of CBS at 6, and by Knight-Ridder, *see* Comments of Knight-Ridder at 3-4, that the equity-or-debt-plus standard replace the *ad hoc* cross-interest policy. As noted by both CBS and Knight-Ridder, the equity-or-debt-plus approach represents a bright-line test that will provide broadcasters and other media entities with greater certainty in structuring their transactions and capitalization.

⁴ FCC Forms 314 and 315 require that a transferee or assignee indicate whether "any funds, credits or other financial assistance for the construction, purchase or operation of the station(s) [are being] provided by aliens, foreign entities, domestic entities controlled by aliens or their agents." Section II, Item 13(b).

D. The Equity-or-Debt-Plus Rule Will Increase Diversity and Spur Competition.

Some commenters argue that the capital available to the media industry and minorities will be unjustifiably constrained by adoption of the equity-or-debt-plus rule. *See* Comments of TCI at 12-13, Comments of HSN at 13, Comments of Fox at 6-7. Specifically, it is contended that an investment in a small media owner in a single market could effectively foreclose the investor from making a "more remunerative investment" in a large, national media owner overlapping that market. Comments of TCI at 13. "Small owners," contends the commenter, "will always be disadvantaged by these decisions, with disastrous implications for diversity and the further development of competition." *Id.* Another commenter maintains that the rule would discourage the flow of capital investment into the broadcast industry. *See* Comments of HSN at 13. And yet another commenter asserts that the equity/debt rule will threaten minority entrepreneurs, whose ownership opportunities depend on access to capital. *See* Comments of Fox at 6-7.

Viacom refutes these contentions. Under the equity/debt approach, media entities are not foreclosed from investing in other media entities that are minority-controlled, that are their affiliates or that are located in the same market. Rather, they are merely limited to a certain ceiling of investment if they wish to avoid attribution.⁵ Indeed, under a model advocated by Viacom in its comments, truly passive investors, that is those contractually prohibited from participating in the programming-related decisions of a television licensee, would be permitted to invest up to 33%. Viacom would even advocate a passive ownership level as high as 49%, as advocated by TCI, *see* Comments of TCI at 3, or as high as 50%, as propounded by ABC, *see* Comments of ABC at 8-9, so long as contractual prohibitions on participating in programming-related activities are in place.

⁵ Viacom supports an attribution level of 10% of the total capitalization of the media entity.

In the event the survival of a media entity (minority-controlled or not) relies solely upon the financial infusion of a broadcast network with which it is affiliated or a same-market media entity, the Commission could and should waive --not the attribution rules-- but the cross-ownership rules in order to prevent the ultimate loss of a media voice. *See, e.g., San Diego Television, Inc., Debtor in Possession*, FCC 96-111 (1996)(permanent waiver of the television duopoly rule granted where one station in bankruptcy); *Fox Television Stations Inc.*, 8 FCC Rcd 5341 (1993)(permanent waiver of the newspaper-television cross-ownership rule where newspaper in bankruptcy). Indeed, Viacom in its comments urges the Commission to adopt a liberal duopoly waiver policy that permits common ownership of television stations even in the same DMA where grant of a waiver would result in maintenance or augmentation of the number of television outlets in that market.⁶

HSN also argues that the equity/debt rule will make it more difficult for new program suppliers, such as HSN, to emerge. According to HSN, the VHF and strong UHF stations are already "taken" and to survive a program supplier may need to assemble "less valuable parcels," such as weaker UHF stations, in more markets through some direct investment in order to assemble a network. Viacom's UPN network, like HSN, is also an emerging broadcast network, but views the equity/debt rule as the great equalizer of attribution rules. That is because the established broadcast networks, which have ample resources available for equity and debt infusions in their local station affiliates, would, under the equity/debt rule, be limited in their use of luring, securing and maintaining local affiliates with an endless supply of financing. At last, the emerging

⁶ Viacom urges, as it did in its comments related to the pending local ownership rule making proceeding, that the Commission be diligent in such waiver requests where the purchasing station is another broadcast network or a broadcast network owned and operated station ("O & O") whose true interests may lie in obtaining control of a second station in a market for the purpose of depriving new networks of affiliates and thereby inhibiting broadcast network competition. *See Comments of Viacom at 7*, in response to *Second Further Notice of Proposed Rule Making* in MM Docket Nos. 91-221 and 87-8, FCC 96-438 (released November 7, 1996).

will be equal players. This may, in fact, put in play for all broadcast networks the more valuable VHF and stronger UHF channels. In short, the equity/debt rule would increase diversity and spur competition among all networks. For these reasons, Viacom eagerly awaits Commission adoption of the equity-or-debt-plus approach, in which attribution is triggered at 10% of the equity, debt or total capitalization of the licensee.

IV. Conclusion.

For the reasons discussed above, as well as in its comments filed on February 7, 1997, Viacom urges the Commission to adopt a stringent form of the equity-or-debt-plus attribution rule proposed in the *Further Notice*.

Respectfully submitted,
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